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ABSTRACT

While some analysts have asserted that the First Amendment was intended to prohibit laws against seditious libel (speech overtly critical of the government), the judicial record reveals a willingness to tolerate some onerous infringements on free expression. In the late 19th and early 20th centuries, 25 states passed "sedition" or "criminal syndicalism" laws, which criminalized anti-government expression. Local ordinances designed to protect public health and safety were also employed in the suppression of speech. Not until the 1925 case of Gitlow v. New York was the First Amendment applied to the states via the Fourteenth Amendment. During this period, state courts also resisted free speech challenges to the sedition laws, as state constitutions offered even less protection for speech than did the First Amendment. Judicial participation in speech suppression challenges the traditional view of the Supreme Court as protector of rights. Today, the First Amendment must be construed in light of present conditions. While the past cannot be ignored, there is a difference between mindless adherence to the ways of the past and appreciation for continuity, stability, and tradition. (Sixty-one footnotes are included.) (SG)

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# FREEDOM OF SPEECH AS PROTECTED BY THE STATES: A REVIEW OF LATE NINETEENTH AND EARLY TWENTIETH CENTURY STATE COURT DECISIONS

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# FREEDOM OF SPEECH AS PROTECTED BY THE STATES: A REVIEW OF LATE NINETEENTH AND EARLY TWENTIETH CENTURY STATE COURT DECISIONS

No viable system of constitutional limitations can derive even its most basic norms exclusively from the objectively perceived intentions of the original authors of the constitutional text. Determining the meaning that should be given to any constitutional provision, such as the First Amendment, requires both interpretation and application. The past cannot control the present because we can never know what the authors of the text really intended, nor can we know how they would respond to contemporary situations. Fortunately, the authors of the Constitution foresaw this problem and created a judicial system whose function would be interpreting their document. This hierarchical system of bodies has, among its myriad of duties, the task of applying the Constitution to contemporary times.

When interpreting the Constitution, however, the Court is more than a "naked power organ."[1] After all, if the judiciary could come to any conclusion it wished about the Constitution, democracy would be jeopardized. Therefore, the judiciary is necessarily controlled by principles. According to Wechsler, "a principled decision is one that rests on reasons with respect to all issues in a case, reasons that in their generality and their

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[1]Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," in Principles, Politics, and Fundamental Law (Cambridge: Harvard University Press, 1961), p. 3.

neutrality transcend any immediate result."[2] When it identifies and adjudicates from such reasoned principles, the Court serves its proper role. But when the Court reasons from its own values, or suggests principles but really follows its own predilections, the Court violates the postulates of the very constitutional model that justifies its power.

In this paper, I will describe a segment of a larger research project investigating the court's role in interpreting the First Amendment as it applies to seditious libel. Although it represents only a subset of free speech cases, seditious libel is the most important type of speech within the realm of expression covered by the First Amendment. While seditious libel has been variously defined throughout American history, a common element of all these definitions involves the idea that it is speech overtly critical of government. Such expression either advocates alternative systems of government or is critical of existing officials and policies. As such, seditious libel is the very type of expression which the First Amendment was designed to protect. The argument here is not that the government should tolerate some criticism, but rather that "defamation of the government is an impossible notion for a democracy."[3] The very essence of democratic self-government requires the toleration of *all* speech relevant to the government.

The analytical justification for such a claim is straightforward. A society may suppress obscenity or restrict media access at criminal trials and still be democratic. However, a society may not suppress criticism of the

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[2]Wechsler, p. 27.

[3]Harry Kalven, Jr., "The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'" The Supreme Court Review, ed. Philip B. Kurland, 1964, p. 205.

government and remain democratic. If "it makes seditious libel an offense, it is not a free society no matter what its other characteristics."[4] In the words of Meiklejohn, "it is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed."[5]

The courts have often implied that the founders of the Republic would have rejected federal government restrictions on seditious libel. In Abrams v. United States, for example, Justices Holmes and Brandeis rejected the claim "that the First Amendment left the common law as to seditious libel in force."[6] Justice Black claimed that American history was consistently against the claim that the government could restrict seditious expression. At one point he noted that "there are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted."[7] In a later case, Justices Black and Douglas boldly concluded that "the First Amendment repudiated seditious libel for this country."[8]

Indeed, as one reads the legal scholars they almost seem to imply that restrictions on seditious expression were immediately repudiated by the legal

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[4]Kalven, p. 205.

[5]Alexander Meiklejohn, Political Freedom (1960; reprint, Westport, Conn.: Greenwood, 1979), p. 27.

[6]Abrams v. United States, 250 U.S. 616, 630 (1919). It seems that Holmes is closer to the mark twelve years earlier where he writes: "The main purpose of such constitutional provisions is to prevent all such previous restraints as had been practised by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." Patterson v. Colorado, 205 U.S. 454, 462 (1907).

[7]Bridges v. California, 314 U.S. 252, 264 (1941).

[8]Beauharnais v. Illinois, 343 U.S. 250, 272 (1952).

community. Schofield's famed essay on freedom of the press argues that the Constitution repudiated the English common law tradition of sanctioning seditious libel.[9] The legal reference treatise, American Jurisprudence, claims that the Sedition Act of 1798 was "vigorously attacked as unconstitutional."[10] Zechariah Chafee, the foremost legal commentator on the First Amendment, claimed that the "First Amendment was written by men . . . who intended to wipe out the common law crime of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America."[11] He continues, claiming that "the framers of the First Amendment sought to preserve the fruits of the old victory abolishing the censorship and to achieve a new victory abolishing sedition prosecutions."[12]

While such legal accounts are ideologically comforting, they create the impression that the courts have consistently functioned to protect the freedom of expression. In this paper, I will take issue with this claim by assessing some representative state court decisions from the late nineteenth and early twentieth century. Throughout I argue that while the courts have

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[9]According to Schofield, the American Revolution was intended to abolish the English common law governing freedom of expression. He concluded that the First Amendment obliterated the English common-law test of bad tendency and adopted the truth standard on all matters of public concern. Henry Schofield, "Freedom of the Press in the United States," Proceedings of the American Sociological Society 11 (1914): 67-116.

[10]70 American Jurisprudence 2d *Seditious Libel* 11 (1973).

[11]Zechariah Chafee, Jr., Free Speech in the United States (Cambridge: Harvard University Press, 1941), p. 21.

[12]Chafee, Free Speech in the United States, p. 22.

played an important role in establishing our modern conception of freedom of expression, the judicial record reveals a willingness to tolerate some onerous infringements on First Amendment freedoms. In support of this thesis, I will consider a few state laws which regulate expression, briefly review several illustrative state court opinions, and finally, consider the implications of these laws and judicial proceedings.

## State Laws Regulating Expression

A review of the late nineteenth and early twentieth century reveals a legislative and judicial system based on suppression. Expression was frequently limited by state law and local ordinances. Twenty-five states had sedition laws pertaining to syndicalist activity.[13] The titles of these laws generally used the terms "sedition" or "criminal syndicalism." Some of the specific titles included: "to prevent the overthrow of the government by force" (New Hampshire), "to prevent the promotion of anarchy" (Vermont), "to define and punish anarchy and to prevent the introduction and spread of Bolshevism and kindred doctrines" (Arkansas), "defining the offence of incitement to crime and unlawful assemblies" (Wyoming), and "prohibiting the performance of any act designed to destroy organized government" (New

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[13]See F. G. Franklin, "Anti-Syndicalist Legislation," American Political Science Review 14 (May 1920): 295. These states include:

> Rhode Island, Connecticut, New Hampshire and Vermont; New York and Pennsylvania; South Carolina, Arkansas, Oklahoma and New Mexico; West Virginia, Ohio, Indiana, Michigan, Illinois, Iowa, Minnesota and South Dakota; Montana, Wyoming, Utah and Idaho; Washington, Oregon and California.

Franklin, p. 295.

Mexico).[14] These laws were generally felonies punishable by fines ranging from $1,000 to $10,000 and prison terms spanning from three to twenty-five years.[15] Other states had laws impinging on expression less connected with sedition. Indiana enacted a law that stressed the importance of liberty and warned of the dangers from anarchy and sabotage; the law criminalized any expression against the existing government.[16] New Hampshire had a law that criminalized all speech advocating any change in the form of federal or state government.[17] Connecticut law prohibited "disloyal, scurrilous or abusive" expression.[18] West Virginia criminalized all teaching "in sympathy or favor of ideas, constitutions or forms of government" antagonistic to the constitution and laws of the federal or state governments.[19]

Expression could also be suppressed effectively through local ordinances. The police power vested in municipal organizations allowed local officials to protect "the public's health, safety, and morals, through various control mechanisms," whether it needed protecting or not.[20] Although not intended for this purpose, police power could be extended to threaten rights of free expression. According to Whipple, "these

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[14]Franklin, pp. 295-296.

[15]See Franklin, pp. 297-298.

[16]See Franklin, p. 297.

[17]See Franklin, p. 297.

[18]See Franklin, p. 297.

[19]Franklin, pp. 297-298.

[20]Alexis J. Anderson, "The Formative Period of First Amendment Theory, 1870-1915," American Journal of Legal History 24 (1980): 66-67.

interpretations of police power complete the machinery of suppression."[21] Under the police power, executive officials of the state could justify suppressing words or acts which might have a tendency to produce mental states from which dangers might spring.[22] Common applications of police powers included ordinances against disturbing the peace, obstructing traffic, engaging in unlawful assembly or unlicensed parades, and misusing public facilities.[23] Local officials actively used these devices to silence expression that challenged traditional social and political norms. As Whipple noted, "violations of freedom of speech and assemblage have been so constant and wide-spread" that one can do little more than select highly visible episodes for close study.[24] Addressing the 1914 meeting of the American Sociological Society, Ross observed that "during the last dozen years the tales of suppression of free assemblage, free press, and free speech, by local authorities or the State operating under martial law have been so numerous as to have become an old story."[25] Murphy has observed that "the attitude of a majority of public and private leaders of the late nineteenth and early twentieth centuries toward civil liberties, as well as the attitude of great numbers of rank-and-file Americans who supported those leaders, held that such liberties were only to be protected for those citizens who had demonstrated, both by

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[21]Leon Whipple, The Story of Civil Liberty in the United States (1927; reprint, New York: Da Capo, 1970), p. 266.

[22]See Whipple, p. 266.

[23]See Whipple, pp. 274-276; and Anderson, pp. 65-66.

[24]Whipple, p. 174.

[25]Ross, quoted by Whipple, p. 174.

their attitudes and behavior, that they were prepared to utilize those freedoms in positive and constructive ways."[26]

Selected State Court Decisions

This climate of intolerance is particularly evident in the Court's treatment of free speech rights. As Rabban has noted, "the overwhelming majority of prewar decisions in all jurisdictions rejected free speech claims, often by ignoring their existence."[27] In those few instances in which it recognized the existence of legitimate First Amendment claims, the Court was quick to subjugate these claims to other more important interests. At no point was the Court willing to go beyond the case at hand to elaborate a broader theory of First Amendment freedoms.[28] A brief review of several state court cases reaching the United States Supreme Court illustrates this lack of concern with First Amendment freedoms. At the outset, the Court simply rejected claims based on the First Amendment, reasoning that the First Amendment was not incorporated into the Fourteenth Amendment. Consequently, cases based on First Amendment claims were dismissed unless the federal government was the agent of suppression. This allowed state and local governments, private organizations, and individuals to overtly violate the principles implicit in the First Amendment. So, for example, in United States v. Cruikshank the Court dismissed Cruikshank's argument that his

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[26]Paul L. Murphy, World War I and the Origins of Civil Liberty (New York: Norton, 1979), p. 40, see also pp. 43-45.

[27]David M. Rabban, "The First Amendment in Its Forgotten Years," Yale Law Journal 90 (January 1981): 523.

[28]See Murphy, World War I, p. 59.

imprisonment by a state court was a violation of the First Amendment.[29] The Court relied on the same reasoning in Spies v. Illinois,[30] and Patterson v. Colorado.[31] It was not until 1925 in Gitlow v. New York that the Court held that the First Amendment was incorporated into the Fourteenth Amendment.[32] This conclusion meant that the First Amendment restrictions on the federal government also applied to other non-federal government agents, particularly to the states. Even with this concession, however, the Court was unwilling to recognize First Amendment claims on their own. Despite holding that Gitlow could claim protection under the First Amendment as applied to the states by the Fourteenth Amendment, for example, the Court held that the New York State syndicalism law used to indict Gitlow was constitutional.

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[29]See United States v. Cruikshank, 92 U.S. 543, 554 (1875).

[30]See Spies v. Illinois, 123 U.S. 131 (1887), aff'g Spies v. People, 12 N.E. 865 (1867).

[31]See Patterson v. Colorado, 205 U.S. 454 (1907).

[32]The Court reasoned:

> For purposes we may and do assume that freedom of speech and of the press--which are protected by the First Amendment from abridgment by Congress--are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.

Gitlow v. New York, 268 U.S. 652, 666 (1925). For an explanation of this case see Charles Warren, "The New 'Liberty' Under the Fourteenth Amendment," Harvard Law Review 39 (1926): 431-465; Edward S. Corwin, Liberty Against Government: The Rise, Flowering and Decline of a Famous Juridical Concept (Baton Rouge: Louisiana State University Press, 1948); Fred R. Berger, Freedom of Expression (Belmont: Wadsworth, 1980), pp. 9-12; and William Cohen, Murray Schwartz, and DeAnne Sobol, The Bill of Rights, rev. ed. (Beverly Hills: Benzinger, 1976).

Frequently the Court dismissed cases which we would recognize today as presenting significant First Amendment issues. In Davis v. Massachusetts, for example, the Court upheld a Boston ordinance requiring that all speakers receive a permit before speaking in public places.[33] Writing for the majority, Holmes noted that "for the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of members of the public than for the owner of a private house to forbid it in his house."[34] The Court arrived at this conclusion because the majority refused to incorporate the limitations imposed by the First Amendment into the Fourteenth Amendment. Further, the Court reasoned that any incremental value of unfettered expression was more than offset by the state's interest in maintaining order. Consequently, the Court concluded that there were no valid constitutional grounds for limiting state police power.[35] This decision was not unique. It was reaffirmed in Commonwealth v. Abrahams, where the Court held that the public interest in maintaining order outweighed the right of individuals to assemble.[36] A variety of cases in

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[33]Davis was an evangelist who sought to preach on the Boston Commons. His social gospel stressed social responsibility and condemned the corruption of city officials. The nature of his message may well explain the response he received.

[34]Davis v. Massachusetts, 167 U.S. 43, 47 (1897).

[35]In later years the Court has struck down such licensing schemes. See, for example, Lovell v. Griffin, 303 U.S. 444 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940); and Kunz v. New York, 340 U.S. 290 (1951).

[36]See Commonwealth v. Abrahams, 156 Mass. 57 (1897).

other jurisdictions yielded precisely the same result.[37] The most graphic example is Mutual Film Corporation v. Industrial Commission of Ohio, which focused on the constitutionality of an Ohio law which required the approval of a board of censors before a film could be exhibited.[38] In upholding the Ohio law, the Court observed that the exhibition of films was a business and hence not subject to First Amendment freedoms. The Court argued that "it cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion."[39] While this lack of concern for First Amendment freedoms is startling by contemporary standards, it was not unusual in turn-of-the-century America.[40]

Even when the Court did recognize the presence of legitimate issues raised in allegations of First Amendment violations, it was unwilling to

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[37]See, for example, People v. Wallace, 85 App. Div. 170, 172 (N.Y.S.Ct. 1903); People v. Pierce, 85 App. Div. 125 (N.Y.S.Ct. 1903); Fitts v. City of Atlanta, 49 S.E. 793 (1905); State v. Sugarman, 126 Minn. 477 (1914); and *Ex parte* Thomas, 103 P. 19 (Cal. Ct. Apps. 1909).

[38]See Mutual Film Corporation. v. Industrial Commission of Ohio, 236 U.S. 230 (1915).

[39]Mutual Film Corporation v. Industrial Commission of Ohio, 236 U.S. 230 (1915). The Court did not consider whether the Ohio statutes violated the First Amendment to the United States Constitution because the First Amendment had not yet been incorporated through the Fourteenth Amendment to apply to the states. Therefore, the Court could only consider whether the Ohio statute violated the Ohio Constitution.

[40]Rabban identifies a number of cases which illustrate a similar lack of concern for freedom of expression. See, for example, *Ex parte* Curtis, 106 U.S. 371 (1882); Halter v. Nebraska, 205 U.S. 34 (1907); and Rosen v. United States, 161 U.S. 29 (1896).

afford them substantive protection. The Court worked from the assumption that speech could be suppressed if it had a "bad tendency." Thus, any speech could be suppressed if it was arguably not in the public interest. A good example of the "bad tendency" rule can be seen in the case of Fox v. Washington.[41] Fox was convicted of a misdemeanor for advocating that individuals ignore a local ordinance prohibiting nude bathing. In sustaining the conviction, the Court refused to comment on the merits of the statute. Instead, the Court simply looked at the statute as a legitimate legislative end. Since Fox's speech operated against a legitimate end by encouraging citizens to break the law, it could be constitutionally suppressed.[42] Commenting on the courts in general, Rabban concluded that "the Supreme Court, with one minor exception, uniformly found against the free speech claimants."[43]

As is usually the case, what is true of the United States Supreme Court is also true of the state courts. As Rabban says, "most of these decisions were as unresponsive to First Amendment values as their Supreme Court counterparts."[44] This was especially damning as state constitutions afforded even less protection to speech than did the First Amendment. In the years prior to Fourteenth Amendment incorporation of the First Amendment these limited state constitutions were all that a citizen could invoke to defend their speech. Summarizing the extent of protection afforded under state constitutions, Rabban has argued that "the overwhelming weight of judicial

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[41]See Fox v. Washington, 236 U.S. 273 (1915).

[42]See Fox v. Washington, 236 U.S. 273 (1915).

[43]Rabban, p. 520.

[44]Rabban, p. 542.

opinion in all jurisdictions offered little recognition and even less protection of free speech interests."[45]

There were a wide variety of barriers to expression in effect during the early twentieth century. State laws and local ordinances severely limited seditious expression. Police power and public pressure could also be invoked to repress speech. The courts functioned to enforce this system of restrictions. They generally ignored claims based on the First Amendment, denigrated the importance of these claims, and when they did recognize them they were willing to suppress speech if it could be demonstrated that such speech exhibited a "bad tendency." By consciously omitting these laws and judicial precedents, scholars lend credence to the liberal construction of the First Amendment which they are espousing. After all, admitting such a long record of suppression undercuts the premise that history justified protection for free speech. Acknowledging this record would force scholars to admit that laws such as the Espionage Act and Smith Act were not momentary legislative aberrations, but rather a legitimate extension of legislative and judicial precedent. Thus, it is not surprising that skilled advocates explain the intolerance of the past away as nothing more than a useless collection of inconclusive cases.

## The Judicial System and the First Amendment

A detailed account of the Court's treatment of seditious libel reveals that the Court can hardly be praised for leading the nation to a new understanding of constitutional rights. Despite the portentous tone of Supreme Court opinions it is not readily apparent that significant threats to

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[45]Rabban, p. 557.

an open society were present in any of the sedition cases upheld by the Court, nor that the legal rules adopted by the Court in those cases could have had any useful systemic consequences even if such threats had been present. Judicial review does not address the causes of intolerance and censorship, nor does it constitute a meaningful check on legislative or public repression.

Such a conclusion directly challenges the traditional role of protector of rights commonly ascribed to the Court. With respect to the First Amendment, this role has been championed by numerous commentators.[46] Chafee believed that the Court should broadly interpret the First Amendment to protect political speech.[47] Emerson has argued that "we have come to depend upon legal institutions and legal doctrines as a major technique for maintaining our system of free expression."[48] Commager claimed that the Court could play "an active, even a decisive, part in the preservation of liberty."[49] Blasi has argued that the Courts can protect the First Amendment during pathological periods during which the tendency toward suppression is

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[46]See for example Archibald Cox, The Role of the Supreme Court in American Government (New York: Oxford University Press, 1976); Lawrence Baum, The Supreme Court (Washington: Congressional Quarterly, 1985); and Henry J. Abraham, Freedom and the Court: Civil Rights and Liberties in the United States, 4th ed. (New York: Oxford University Press, 1982).

[47]See Chafee, "Freedom of Speech in War Time," Harvard Law Review 32 (June 1919): 959-960.

[48]Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage, 1970), p. 5.

[49]Henry Steele Commager, Freedom and Order: A Commentary on the American Political Scene (New York: Braziller, 1966), pp. 25-29.

pronounced.[50] Indeed, Baum has gone so far as to conclude that "the Court has been far more supportive of the First Amendment rights than the other branches of government, whose policies frequently have been antagonistic to these rights."[51] Even those who recognize the Court's erratic record on free speech have been quick to offer a defense of the Courts. Bork claims that the Court has made fundamental errors in interpreting the First Amendment and then goes on to assign the courts the responsibility of protecting the public's "freedom to discuss government and its policies."[52] Abraham worries that the Court may not have done enough to protect "The Precious Freedom of Expression," yet concludes that "in the final analysis we must confidently look to the Court to draw a line based on constitutional common sense."[53] Cox summarily dismisses decisions restricting First Amendment freedoms as "minor blemishes."[54]

Although it has only considered a small portion of the judicial history of seditious libel, the laws and cases reviewed in this paper suggest that the courts are not as effective in protecting expression as some of these scholars might suggest. More importantly, this line of research suggests that we need to reconsider how we justify claims for free expression. It is my contention

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[50]Vincent Blasi, "The Pathological Perspective and the First Amendment," Columbia Law Review 85 (1985): 449-514.

[51]Baum, p. 69. See also Learned Hand, The Bill of Rights (Cambridge: Harvard University Press, 1958), p. 69.

[52]Robert N. Bork, "Neutral Principles and Some First Amendment Problems," Indiana Law Journal 47 (1971): 23.

[53]Abraham, p. 219.

[54]Cox, p. 49.

that the brilliance of the framers lies not in their view of free speech, but rather in their conception of the Constitution. The Constitution they wrote is not a complex codification of rules and regulations, but rather a set of principles which John Marshall claimed were "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[55] If these principles are to have meaning we must apply them to the present irrespective of how they may have been construed in the past. Writing in 1789, Jefferson eloquently argued that "the earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct."[56] Each generation, according to Jefferson, must create its own conception of the Constitution because the "constitution and the laws of their predecessors extinguished them, in their natural course, with those who gave them meaning."[57]

Just as Jefferson believed that each generation must create its own Constitution, we must create our own First Amendment. There are many First Amendment problems which command our attention. Yet, in resolving these problems we must avoid the temptation to look backward as we move forward. Jefferson explicitly recognized this when he wrote that "some men look at constitutions with sanctimonious reverence, and deem them, like the ark of the covenant, too sacred to be touched."[58] Such reasoning provides

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[55]John Marshall, quoted by James Craig Martin, "Why the Constitution Works?" ABA Journal 73 (September 1987): 80.

[56]Jefferson to James Madison, 6 September 1789, in Thomas Jefferson: Writings, ed. Merrill D. Peterson (New York: Library of America, 1984), p. 80.

[57]Jefferson, p. 80.

[58]Jefferson, quoted by Martin, p. 80.

"men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment."[59] Jefferson rejected such a notion because he believed that laws and constitutions must go hand in hand with the progress of the human mind. He concluded that as the human mind "becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manner and opinions with the change of circumstances, institutions must advance also, and keep pace with the times."[60] This theme was later reiterated by one of the most influential of modern jurists, Felix Frankfurter, who argued that great concepts like liberty were purposely left to gather meaning from experience "for they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."[61]

To justify freedom of expression, we must recognize the unique nature of our own times and realize that the First Amendment must change to account for new conditions. The strongest case for freedom of expression lies not in histories or legal treatises: rather, it lies in our belief that such freedoms are relevant to our times. While it is intellectually convenient and ideologically comforting to justify the First Amendment by appeals to the founders, history, or the courts, such appeals confuse reality and illusion. This is not to say, however, that the past is unimportant. Ignoring the past would surely wreak havoc on the present. Meanings that have been ascribed

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[59]Jefferson, quoted by Martin, p. 80.

[60]Jefferson, quoted by Martin, p. 80.

[61]National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949).

to a constitutional provision cannot help but be a function in part of the intentions of the framers and the intentions of the contemporary interpreters. There is a crucial difference, however, between respect for the past that takes the form of mindless adherence to the supposed intentions of the framers and respect for the past in the form of appreciation for the value of continuity, stability, and tradition.